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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DICK D. MOORE, GEORGE LOMBARDI, DALE RILEY, MYRNA TRICKEY, RANDIE KAISER, CRANSTON MITCHELL, JEANIE SCHNEIDER-THIES, CHRISTINE EAVES, TONY GAMMON, WILLIAM BUCK, JENNIFER SACHS, PAUL CASPARI, TED FIRTEG,

Petitioners,

vs.

EVERETT E. KENNISON,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a plaintiff entitled to attorney's fees as a "prevailing party" under 42 U.S.C. § 1988 when he obtains a reversal of a district court's order dismissing his case but when, after remand, his claim is dismissed with prejudice by the district court and he obtains no relief as a result of his litigation?

2. Is it proper to employ a "catalyst" analysis to a plaintiff's request for attorney's fees under 42 U.S.C. § 1988 when plaintiff points to actions taken by a non-party during the course of litigation but plaintiff's claim is dismissed with prejudice by the district court?

3. If it is proper to employ a "catalyst" analysis to a plaintiff's request for attorney's fees under 42 U.S.C. § 1988, although the plaintiff's claim is dismissed with prejudice by the district court, what is the plaintiff's burden of proof in demonstrating his entitlement to fees?

STATEMENT PURSUANT TO RULE 14.1(b)

The names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are found in the caption of this Petition for Writ of Certiorari.

The defendants/appellees to the proceedings below are petitioners herein; the plaintiff/appellant below is respondent herein.

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PETITION FOR WRIT OF CERTIORARI

Dick Moore, George Lombardi, Dale Riley, Myrna Trickey, Randie Kaiser, Cranston Mitchell, Jeanie Schneider-Thies, Christine Eaves, Tony Gammon, William Buck, Jennifer Sachs, Paul Caspari, and Ted Firteg, defendants in the action below, respectfully pray that a writ of *certiorari* issue to review the Order of the United States Court of Appeals for the Eighth Circuit awarding attorney's fees on appeal, filed December 14, 1993.

OPINIONS BELOW

This petition concerns the award of attorney's fees which was granted in an order of the United States Court of Appeals for the

Eighth Circuit, entered on December 14, 1993. Appendix G. The order followed that Court's reversal of the district court's dismissal of Everett Kennison's (the inmate's) lawsuit for failure to state a claim. The Court had reversed on only one issue (i.e., whether the inmate had stated a claim for an *ex post facto* violation), finding the other issues raised on appeal to be meritless. The Court's opinion, which was unpublished, is reproduced at Appendix A.

On remand, the district court again dismissed the lawsuit with prejudice finding no *ex post facto* violation. The district court's order on remand and memorandum in connection therewith are attached as Appendices B and C.

The inmate's attorney on appeal then submitted a memorandum in support of his motion for attorney's fees. Appendix D. Defendants/petitioners (the "State employees") replied, Appendix F, and submitted a letter to Michael Gans, Clerk of the United States Court of Appeals for the Eighth Circuit, in response to a request for information from the Clerk's office. Appendix E. The Eighth Circuit granted a partial allowance of attorney's fees to the inmate on December 14, 1993. Appendix G.

The State employees then filed a motion for reconsideration and petition for rehearing or, alternatively, rehearing en banc, which was denied on February 9, 1994. Appendix H.

JURISDICTION

The Order of the United States Court of Appeals for the Eighth Circuit allowing attorney's fees was entered on December 14, 1993. The Order of the United States Court of Appeals for the Eighth Circuit denying the State employees' motion for reconsideration and petition for rehearing or, alternatively, rehearing en banc was entered on February 9, 1994. This petition was filed and served in accordance with the rules of this Court within ninety (90) days of February 9, 1994. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1988(b):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The inmate, Everett Kennison, was a state prisoner incarcerated at the Missouri Eastern Correctional Center. While incarcerated, he filed suit under 42 U.S.C. § 1983 against various Department of Corrections officials and employees of the Missouri Board of Probation and Parole (the State employees). The inmate alleged, *inter alia*, that the requirement that he complete the Missouri Sexual Offender Program (MOSOP) prior to eligibility for parole violated the *ex post facto* provisions of the United States Constitution. He asserted jurisdiction in the district court pursuant to 28 U.S.C. §§ 1331 and 1343. The district court dismissed his suit for failure to state a claim.

In an unpublished opinion dated June 29, 1993, the Eighth Circuit reversed on only the *ex post facto* issue, finding the other issues raised on appeal to be meritless. The inmate was represented by appointed counsel on appeal.

On remand, the district court again dismissed the lawsuit with prejudice finding that the requirement that the inmate complete MOSOP for parole eligibility was not a violation of the *ex post facto* clause.

During this litigation, the inmate voluntarily completed MOSOP. He was also released from prison pursuant to Execu-

tive Order 93-18, issued by Missouri Governor Mel Carnahan during the summer of 1993. That summer, severe flooding in the mid-Western United States affected a Missouri Department of Corrections facility, Renz Correctional Center, and inmates had to be evacuated to other prisons. The Executive Order provided that certain inmates could be released from incarceration in order to relieve the resulting prison overcrowding. A condition of the inmates' release was that they were to participate in flood relief activities as directed by their parole officers. Kennison was released pursuant to this Executive Order because he had successfully completed MOSOP during the pendency of this litigation. See Appendices E and F.

The inmate's appointed counsel on appeal requested attorney's fees, but offered no evidence in support of the request. Rather, he submitted a memorandum in which he argued, without any supporting affidavits or other evidence, that the inmate was released 54 days before his originally scheduled release date because the State employees wanted to "cut their losses" and "moot the controversy." The Eighth Circuit granted "an allowance of $2,500.00 on the ground that [the inmate] in this case has prevailed, if at all, only to a slight degree." Judge Wollman dissented and would not have allowed any attorney's fees.

The State employees' motion for reconsideration and petition for rehearing or, alternatively, rehearing en banc was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION OF THE COURT OF APPEALS TO AWARD ATTORNEY'S FEES ON APPEAL TO A PLAINTIFF WHO OBTAINED REVERSAL OF A DISTRICT COURT'S ORDER DISMISSING HIS CASE BUT WHOSE CASE, AFTER REMAND, WAS AGAIN DISMISSED WITH PREJUDICE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND CONSTITUTES SO FAR A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This petition presents the "peculiar-sounding question whether a party who litigates to judgment and loses on all his claims can nonetheless be a 'prevailing party.'" *Hewitt v. Helms*, 482 U.S. 755, 757 (1987). The short answer below should have been "no," and this Court should vacate the lower court's judgment because the inmate was not a "prevailing party" as that phrase is used in 42 U.S.C. § 1988. His claim was dismissed on the merits after remand and he can point to no relief which he obtained as a result of this litigation.

This Court recently reviewed awards of attorney's fees under § 1988 and the definition of "prevailing party" in *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992). In *Farrar*, this Court emphasized that Congress' intent in authorizing fees was "'to permit the . . . award of counsel fees only when a party has prevailed on the merits.'" 113 S.Ct. at 572 (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980)). "'[L]iability on the merits and responsibility for fees go hand in hand. . . .'" 113 S.Ct. at 572 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). After discussing the definition of "prevailing party" upon which

this Court had elaborated in three recent case — *Hewitt v. Helms*, 482 U.S. 755(1987), *Rhodes v. Stewart*, 488 U.S. 1 (1989), and *Texas State Teachers Ass'n. v. Garland Independent School Dist.*, 489 U.S. 782 (1989) — this Court concluded:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, . . . or comparable relief through a consent decree or settlement, ... In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

113 S.Ct. at 573 (citations omitted).

Here, the inmate's suit was initially dismissed by the district court for failure to state a claim; the Eighth Circuit reversed and remanded for examination of the *ex post facto* issue. On remand, the district court again dismissed, finding that the requirement that the inmate complete MOSOP for parole eligibility was not a violation of the *ex post facto* clause. The inmate gained absolutely no relief on the merits of his claim, for the MOSOP requirement was held to be legally appropriate. His claim for injunctive relief also became moot because he elected to complete, and successfully completed, MOSOP during the litigation. He should not have been awarded attorney's fees for losing.

In making its fee award, the Eighth Circuit did not articulate in what way it believed the inmate had prevailed. Rather, the court stated that he had "prevailed, if at all, only to a slight degree." If, by its determination that he had "prevailed, if at all, only to a slight degree," the Eighth Circuit was referring only to Kennison's having obtained a reversal and remand from that court, that court was wrong.

The obtainment of the reversal and remand of the district court's first dismissal of his claim cannot in itself qualify the inmate as a prevailing party for purposes of § 1988. This Court, the Eighth Circuit itself and other courts of appeal have embraced the contrary contention.[1] Generally, the opinions of these courts stand for the proposition that "[a] procedural victory that may be the way station to utter substantive defeat creates no right to fees." *Richardson v. Penfold*, 900 F.2d 116, 119 (7th Cir. 1990). The opinions' common thread is embodied in this Court's observation in *Hewitt v. Helms* that, "Respect for ordinary language requires that a plaintiff receive *at least some relief on the merits* of his claims before he can be said to prevail." 482 U.S. 755, 760 (1987) (emphasis added).

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[1] See, e.g. *Rhodes v. Stewart*, 488 U.S. 1 (1989), *Hewitt v. Helms*, 482 U.S. 755 (1987), *Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980) (party won an interlocutory procedural ruling, which did not establish his entitlement to some relief on the merits of his claim; party was not a "prevailing party"), *Friedman v. Arizona*, 912 F.2d 328, 333 (9th Cir. 1990) (plaintiff won injunction pending appeal but trial court's dismissal of claim affirmed), *Richardson v. Penfold*, 900 F.2d 116, 118-19 (7th Cir. 1990) (appellate counsel successfully reversed summary judgment; no fees "unless and until" plaintiff obtains damages at trial or positive monetary settlement), *Quinn v. State of Missouri*, 891 F.2d 190, 194 (8th Cir. 1989) (district court decision on merits, favorable to plaintiffs, vacated by 8th Circuit), *Bernal-Garcia v. I.N.S.*, 852 F.2d 144, 147 (5th Cir. 1988) (petitioner obtained remand of his case for reconsideration in light of additional evidence), *Proctor v. Consolidated Freightways Corp. of Delaware*, 795 F.2d 1472, 1479 (9th Cir. 1986) (plaintiff obtained reversal of summary judgment and remand for trial), and *Paragould Music Co., Inc. v. City of Paragould, Arkansas*, 738 F.2d 973, 975 (8th Cir. 1984) (plaintiff obtained temporary restraining order, but case dismissed before determination on merits). Fees were awarded in none of these cases.

The plaintiff in *Bernal-Garcia* sought attorney's fees as a prevailing party under the Equal Access to Justice Act (EAJA). 852 F.2d at 147. Fee awards under the EAJA and 42 U.S.C. § 1988 are analyzed similarly. *Hensley v. Eckerhart*, 461 U.S. 424, 433, n. 7 (1983).

For example, in *Hewitt v. Helms*, faced with a similar procedural fact pattern, this Court addressed the "peculiar-sounding question whether a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party.'" 482 U.S. at 757. In that action, also a § 1983 claim, against prison officials for alleged due process violations, plaintiff Helms similarly obtained no relief. "The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim." *Id.* at 760. "That is not the stuff of which legal victories are made." *Id.* Observing that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail," this Court held that plaintiff Helms was not a prevailing party. *Id.*

Rhodes v. Stewart, 488 U.S. 1 (1988), presented a similar fact pattern. There, this Court carried *Hewitt* one step further and reversed an award of fees premised solely on a declaratory judgment that prison officials had violated two prisoners' constitutional rights. 488 U.S. at 4. By the time the district court entered judgment, one of the plaintiffs had died and the other was no longer in custody. *Id.* at 3. The Court reaffirmed that a judgment — declaratory or otherwise — "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Id.* at 4.

Here, the inmate sought not to be required to complete MOSOP prior to becoming eligible for parole, theorizing that the MOSOP requirement violated the *ex post facto* clause. The inmate indeed obtained a reversal and remand of the district court's initial dismissal of his claim, but that maneuver was a mere way station to utter substantive defeat. His claim was dismissed again by the district court in its second incarnation there. Pursuant to the teachings of *Hewitt* and *Rhodes*, and similar cases, the inmate cannot be said to have prevailed, and should not have been awarded fees.

Therefore, this Court should grant *certiorari*. The State employees suggest that this Court could issue an opinion without oral argument, as it did in *Rhodes v. Stewart*, 488 U.S. 1, to clarify this issue.

II. THE DECISION OF THE COURT OF APPEALS TO AWARD ATTORNEY'S FEES ON APPEAL TO A PLAINTIFF WHOSE CASE WAS DISMISSED WITH PREJUDICE, BUT WHO POINTS TO ACTIONS TAKEN BY A NON-PARTY DURING THE COURSE OF LITIGATION IN SUPPORT OF HIS APPLICATION FOR ATTORNEY'S FEES, CONFLICTS WITH DECISIONS OF THIS COURT, THE EIGHTH CIRCUIT, OTHER COURTS OF APPEALS AND DISTRICT COURTS, HOLDING THAT A PARTY MUST RECEIVE AT LEAST SOME RELIEF ON THE MERITS OF HIS CLAIMS BEFORE HE CAN BE A "PREVAILING PARTY" UNDER 42 U.S.C. § 1988.

The inmate here obtained no enforceable judgment against the State employees that would entitle him to attorney's fees under § 1988. He in fact chose to participate in, and successfully completed, MOSOP during the litigation, mooting his claim for injunctive relief. Nevertheless, in his attempt to obtain a fee award, the inmate pointed to his release from prison during this lawsuit and argued that he had been released because the State employees wanted to "cut their losses" and "moot the controversy." The inmate, however, submitted no affidavits, documents or, in fact, any admissible evidence to support his claim.

In limited circumstances not applicable here, a party who does not obtain an enforceable judgment against the defendant from whom fees are sought may be entitled to attorney's fees if the party obtains comparable relief through a consent decree or

settlement. *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566, 573 (1992) (citing *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) and *Maher v. Gagne*, 448 U.S. 122, 129 (1980)). In such situations, courts have employed various versions of what is generally called the "catalyst" test for determining whether the party should be awarded attorney's fees.[2] This Court has not had occasion to examine the precise contours of any such catalyst test for fee awards under § 1988. See *Hewitt v. Helms*, 482 U.S. at 763.

This Court has recently re-emphasized that "to qualify as a prevailing party, a civil rights plaintiff must obtain *at least some relief on the merits* of his claim." *Farrar v. Hobby*, 113 S.Ct. at 573 (emphasis added). Many courts which utilize a catalyst test have incorporated this fundamental requirement into their version of the test. These courts frame their inquiries in two parts: 1) whether a causal connection exists between the suit and the change in the defendant's behavior, and 2) whether the change that resulted was actually required by law. *Paris v. U.S. Dep't. of Housing & Urban Development*, 988 F.2d 236, 241 (1st Cir. 1993), *Collins v. Romer*, 962 F.2d 1508, 1511 (10th Cir. 1992), *Hendrickson v. Branstad*, 934 F.2d 158, 161 (8th Cir. 1991), *Strickland v. Lamar County Board of Comm'rs.*, 807 F.Supp. 121, 124 (M.D. Ga. 1992), and *Mosley v. Hairston*, 765 F.Supp. 915, 918 (S.D. Ohio 1991).

In the present case, the inmate could not satisfy either prong of this version of the catalyst test, let alone both. The State

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[2] *See, e.g., Church of Scientology Flag Service v. City of Clearwater*, 2 F.3d 1509, 1513 (11th Cir. 1993), *Am. Counsel of the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 250 (10th Cir. 1993), *Paris v. U.S. Dep't. of Housing & Urban Development*, 988 F.2d 236, 238 (1st Cir. 1993), *Friend v. Kolodzieczak*, 965 F.2d 682, 684-85 (9th Cir. 1992), *Koster v. Perales*, 903 F.2d 131, 134 (2nd Cir. 1990), *Crabtree v. Collins*, 900 F.2d 79, 82-83 (6th Cir. 1990), *Posada v. Lamb County, Texas*, 716 F.2d 1066, 1071 (5th Cir. 1983) and *United Handicapped Federation v. Andre*, 622 F.2d 342, 346 (8th Cir. 1980).

employees were not, under any circumstances urged by the inmate, required by law to change his parole date by even one day, and there was no evidence that they effected his release because of his lawsuit. In fact, the inmate's release was effected by the inmate's own choice to participate in and complete MOSOP, an act of God (the mid-Western flooding in the summer of 1993), and an Executive Order issued by a non-party in response to the act of God. To permit the inmate, nevertheless, to recover attorney's fees as if he had prevailed on the merits of his claim violates decisions of this Court, the Eighth Circuit, and other courts of appeals and district courts.

To permit the award to stand would also operate to deter prison officials from undertaking any type of ameliorative efforts with regard to inmates involved in litigation for fear of incurring awards of attorney's fees, and would likely chill routine, administrative activities as well. For example, prison officials may require bed space in a maximum security facility for a particular inmate, and decide that a second inmate can and should be moved to a lower security facility to make room. Under the Eighth Circuit's rationale here, however, if the second inmate is suing prison personnel at the time the move is contemplated, the prison officials will feel constrained to look elsewhere for fear of subjecting the defendants to an award of attorney's fees, regardless of whether that inmate ultimately wins his suit.

The same result may even obtain in administrative matters as mundane as intra-prison transfers to housing units which inmates deem "more desirable" for whatever reason. Similarly, prison officials must constantly adjust prison policy and procedure to effectively address the changing dynamics of their institutions. The Eighth Circuit's ruling encourages inmate litigants to point to policy and procedure changes as a basis for fee awards. Indeed, litigation often lasts for years. Under the Eighth Circuit's ruling, an inmate may be able to seek fees if anything favorable happens to him any time during that period.

Congress cannot have intended these results in enacting § 1988. This Court has held that fee applications, including those made pursuant to § 1988, should not spawn burdensome satellite litigation. *City of Burlington v. Dague*, ___ U.S. ___, 112 S.Ct. 2638, 2643 (1992), and *Hensley v. Eckerhart*, 461 U.S. 434, 437 (1983) (request for fees "should not result in second major litigation"). The Seventh Circuit has recognized, however, that:

> Fee litigation has become a heavy burden on the federal courts. It can turn a simple case into two or even more cases — the case on the merits, the case for fees, the case for fees on appeal, the case for fees for proving fees, and so on ad infinitum, or at least ad nauseam. *See Muscare v. Quinn*, 680 F.2d 42 (7th Cir. 1982).

Ustrak v. Fairman, 851 F.2d 983, 987 (1988).

This Court should grant *certiorari*, and reverse and remand this case with directions to deny all fees to the inmate.

III. IT IS OF CONSIDERABLE IMPORTANCE THAT THIS COURT CLARIFY THE BURDEN OF PROOF UPON A PARTY SEEKING ATTORNEY'S FEES UNDER 42 U.S.C. § 1988—WHETHER BY CLEAR AND CONVINCING EVIDENCE OR A PREPONDERANCE—IN SITUATIONS IN WHICH THE PARTY OBTAINS NO FORMAL RELIEF ON THE MERITS.

As mentioned above, courts have not recognized a uniform test for determining whether a party, who does not receive formal legal relief, is a "prevailing party" for purposes of a fee award. Further, the courts, to the extent the issue has been addressed, have not uniformly identified the relevant burden of proof associated with fee awards in such cases. Many courts which utilize a catalyst-type test have generally recognized that the parties seeking fees are required to demonstrate that a causal connection exists between the suit and the change in the defen-

dants' behavior, and that the resulting change was actually required by law.[3] However, no court has specifically identified the parties' burden of proof in doing so, whether by a preponderance of the evidence or by clear and convincing evidence.

In *Collins v. Romer*, for example, the Tenth Circuit struggled mightily with the issue. The court noted that the district court found a "preponderance" and a "rather clear preponderance" of the evidence supported the causal link. 962 F.2d at 1512. The court then agreed that establishment of the causal link was "clear beyond question" and found that the district court had "apparently" based its determination on "ample evidence." *Id.*

Utilizing a different approach, the Fifth Circuit has come close. Under its version of the catalyst test, a plaintiff must establish both that the goal of the lawsuit was achieved and that the suit was a "significant" catalyst in prompting the defendant to take action. *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Board*, 919 F.2d 374, 378 (5th Cir. 1990). Once the plaintiff demonstrates both elements, he has made a *prima facie* case that he is a prevailing party and is entitled to attorney's fees. *Id.* "The burden of proof then shifts to the defendant, who can challenge the entitlement only by showing that its conduct was a 'wholly gratuitous response to a lawsuit that lacked colorable merit.'" *Id.* (citation omitted).

Conversely, the Second Circuit, using yet another analysis, has held that if the plaintiff obtains relief through settlement or the like, which is of the general type demanded in his complaint, he is entitled to a fee award if he can simply "'show a causal

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[3] *See, e.g., Paris v. U.S. Dep't. of Housing & Urban Development*, 988 F.2d 236, 241 (1st Cir. 1993), *Friend v. Kolodzieczak*, 965 F.2d 682, 684-85 (9th Cir. 1992), *Collins v. Romer*, 962 F.2d 1508, 1511 (10th Cir. 1992), *Hendrickson v. Branstad*, 934 F.2d 158, 161 (8th Cir. 1991), *Strickland v. Lamar County Board of Comm'rs.*, 807 F.Supp. 121, 124 (M.D. Ga. 1992), and *Mosley v. Hairston*, 765 F.Supp. 915, 918 (S.D. Ohio 1991)

connection between the relief obtained and the litigation in which the fees are sought.'" *Koster v. Perales*, 903 F.2d 131, 135 (2nd Cir. 1990)(citation omitted). Other courts have simply conducted an analysis pursuant to this Court's opinions in *Texas State Teachers Ass'n. v. Garland Independent School Dist.*, 489 U.S. 782 (1989) and similar cases. *See Church of Scientology v. City of Clearwater*, 2 F.3d 1509, 1513 (11th Cir. 1993), and *Crabtree v. Collins*, 900 F.2d 79, 82 (6th Cir. 1990). Again, however, these courts have failed to articulate the burden of proof placed upon the party seeking attorney's fees.

This Court has never specifically addressed the issue, although in *Hewitt v. Helms* this Court implied that a catalyst theory requires plaintiff to "demonstrate a clear causal link," 482 U.S. at 763, and in his concurring opinion in *Hensley v. Eckerhart*, 461 U.S. 424, 441(1983), Chief Justice Burger wrote that a party must establish his right to fees by "clear and convincing evidence."

In the present case, the inmate offered no evidence in support of his motion for attorney's fees. He simply submitted a memorandum in which he made bald assertions that:

> 1) He was released two months earlier than his release date, 2) at a time "corresponding with the litigation," and 3) that the early release demonstrated an intent on the part of [the State employees] to "cut their losses" and "moot the controversy."

Appendix D, p. A-18.

Under any formulation discussed above, the inmate was not entitled to attorney's fees because the district court ultimately determined that his claim was meritless. That is, the MOSOP requirement did not improperly interfere with the inmate's parole eligibility. Moreover, the inmate's successful completion of MOSOP mooted his claim for injunctive relief. Under no circumstances would the State employees have been legally

required to release the inmate early as a result of his efforts in this lawsuit.

Only the fortuitous natural event of record — flooding — and the resulting prison overcrowding led to the inmate's earlier release from prison, pursuant to the Governor's Executive Order and prior to the district court's second dismissal of the inmate's claim. The inmate pointed to this chronology of events, arguing it demonstrated an intent on the part of the State employees to "cut their losses" and "moot the controversy." While some courts have recognized that the chronology of events can be *an* important factor in determining whether defendants took actions in response to a plaintiff's lawsuit, *Pearson v. Fair*, 980 F.2d 37, 44 (1st Cir. 1992) (court examined chronology and district court's series of detailed injunctive orders); *United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (court examined chronology and testimony of defendant's Special Projects Director), at least two courts have rejected plaintiffs' attempts to rely solely on the chronology of events to support their contentions that their suits were catalysts for changes in the defendants' behavior. *Pardo v. Hosier*, 946 F.2d 1278, 1285 (7th Cir. 1991) ("attorneys for plaintiffs have not presented any facts"), and *Mosley v. Hairston*, 765 F.Supp. 915, 919 (S.D. Ohio 1991). The inmate's similar attempt here should have been rejected.

The conflict between the lower court's award and the opinions of most other courts which have dealt with the issue, as well as the Eighth Circuit's own cases, in conjunction with the absence of any uniform standard for awards in such cases, demands this Court's intervention. The proper burden of proof which the inmate was required to carry below has never been identified, and in view of the absence of any evidence presented by the inmate in support of his fee request, it is of great importance that this Court resolve the conflicting approaches currently in use by the various courts of appeals and clarify the proper burden of proof in such cases.

CONCLUSION

For the reasons stated, the petition for writ of *certiorari* should be granted. The decision of the United States Court of Appeals for the Eighth Circuit allowing attorney's fees to the inmate should be reversed and remanded with directions to deny the fee request in whole. Alternatively, the State employees urge this Court to grant a writ of *certiorari* and clarify the issues presented in this case.

Respectfully submitted,

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May 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2030

Dewayne Clifton,
Appellant,

v.

John Ashcroft; William Webster; Dick Moore; George Lombardi; Randie Kaiser; Jeanie Schneider-Thies; Beth Finders; Myrna Trickey; Cranston Mitchell,
Appellees.

David C. Finley,
Appellant,

v.

William Webster, individually and in his official capacity as Attorney General of the State of Missouri; John Ashcroft, individually and in his official capacity as Governor of the State of Missouri; Dick Moore, individually and in his official capacity as Director of the Missouri Department of Corrections and Human Resources; George A. Lombardi; John Does, unknown employees, agents, administrators and facilitators of the State of Missouri who create, administer and enforce programs and policies and complained of hereafter,
Appellees.

No. 92-2501

Everett E. Kennison,
Appellant,

v.

Dick D. Moore; George Lombardi; Dale Riley; Myrna Trickey; Randie Kaiser; Cranston Mitchell; Jeanie Schneider-Thies; Christine Eaves; Tony Gammon; William Buck; Jennifer Sachse; Paul Caspari; Ted Firteg,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: March 15, 1993

Filed: June 29, 1993

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

Dewayne Clifton, David Finley and Everett Kennison, inmates in the Missouri state system, appeal from the district court's grant of a motion to dismiss their complaint challenging the Missouri Sexual Offenders Program (MOSOP). The inmates contend the 1990 MOSOP statute, as applied to them, constitutes an impermissible *ex post facto* law. We reverse the district court and remand for further proceedings.

I.

In 1980, the Missouri legislature promulgated a statute establishing MOSOP, with the stated intent of rehabilitating convicted sexual offenders. The statute specifies: "The ultimate goal shall be the prevention of future sexual assaults by the participants in such programs . . . ." Mo. Rev. Stat. § 589.040.1 (1986). The first phase of MOSOP includes a private interview and nine introductory classes providing an overview of behavior and treatment. *Missouri Sexual Offender Program, For Your*

Information, Appellant's App. 26. The second phase involves roughly twelve months of group therapy.[1] *Id.*

The 1980 statute stated that all convicted sexual offenders must participate in MOSOP:

> All persons imprisoned by the department of corrections and human resources for sexual assault offenses shall be required to participate in the programs developed pursuant to subsection 1 of this section.

Mo. Rev. Stat. § 589.040.2 (1986). In 1984, the Department of Corrections promulgated a regulation requiring completion of the program for parole eligibility:

> Inmates convicted of sex offenses shall participate in and complete the prescribed treatment program developed by the Department of Corrections and Human Resources prior to being eligible for parole (589.040 RSMo).

14 C.S.R. 80-2.020(4)(d), Appellant's App. 30. In 1990, the state legislature amended the MOSOP statute to require inmates to complete MOSOP in order to be considered for parole. Mo. Rev. Stat. § 589.040.2 (Supp. 1992).

Clifton, Finley and Kennison were convicted of rape and/or sodomy before 1990. All three were incarcerated in the Missouri state system. They participated in MOSOP, but failed to complete the program. Because of their failure to complete MOSOP, they were denied credit release dates.

On February 8, 1991, Clifton filed a complaint under 42 U.S.C. § 1983 against various state and prison officials [state

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[1] The program is designed to include a third, voluntary phase with classes in specialized areas. *Missouri Sexual Offender Program, For Your Information*, Appellant's App. 26. The phase was not operative at the time of this action.

officials], alleging the MOSOP completion requirement violated constitutional provisions against *ex post facto* laws and seeking equitable and monetary relief.[2] A week later, Finley filed a similar complaint. The state officials in each case filed motions to dismiss.

On May 6, 1991, the district court consolidated the two cases and granted the motions to dismiss, giving the inmates leave to file an amended complaint including the *ex post facto* allegations. Clifton and Finley filed the amended complaint, and the district court granted a motion to dismiss for failure to state a claim on January 10, 1992.

In April of 1991, Kennison filed a similar complaint and at the district court's request filed an amended complaint on June 5, 1991. On January 13, 1992, the district court granted a motion to dismiss for failure to state a claim.

The inmates in both actions appealed.[3] The district court granted the state officials' motion to consolidate the appeals.

II.

Clifton, Finley and Kennison contend the district court erred in granting the motion to dismiss. They maintain their complaint

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[2] Although monetary relief is permissible in a state prisoner § 1983 case, *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973), equitable relief involving the fact or length of custody is not. *Id.* at 500. To challenge "the very fact or duration of his physical imprisonment" in federal court, an inmate must exhaust state remedies and petition for a writ of habeas corpus under 28 U.S.C. § 2254. *Id.*

[3] Clifton and Finley's notice of appeal had their typed names in the form of a signature block, but neither inmate signed the document. Because the notice of appeal of *pro se* appellants should be construed liberally and the state officials had specific notice of the identity of the inmates, the typed notice is sufficient in this case to confer jurisdiction on appeal. *See Thiem v. Hertz Corp.*, 732 F.2d 1559, 1562 (11th Cir. 1984).

stated a cause of action because the application of the 1990 MOSOP statute to them in denying them parole violated provisions against *ex post facto* laws.

A dismissal is proper if, taking the factual allegations in the complaint as true, no relief could be granted to the complainants. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Further, this court will not review state rehabilitative programs "absent a clear showing that such programs are being purposefully used to infringe upon protected constitutional rights." *Jackson v. McLemore*, 523 F.2d 838, 839 (8th Cir. 1975). An action under 42 U.S.C. § 1983 can provide a remedy only for violations of constitutionally protected rights. *Brookins v. State of Missouri Board of Probation & Parole*, 586 F. Supp. 29, 30 (W.D. Mo. 1984).

Clifton, Finley and Kennison contend the state officials violated their constitutionally protected rights by denying credit release dates on the basis of an *ex post facto* law, in violation of Article I, § 10 of the United States Constitution. An *ex post facto* law has two elements: it is retrospective and it disadvantages the offender. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). For *ex post facto* purposes, we must look at the punishment applicable at the time of the offenses. *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

The three inmates committed their crimes prior to 1990. The Sexual Offender Program Initial Information required to be read and signed by all participants states:

> The successful completion of MOSOP Phase I and Phase II is mandatory as it relates to release on parole for inmates imprisoned for sexual assault offenses who committed their offenses after August 13, 1980 (589.040 RSMo).

Clerk's Record 84, 104. In denying Finley parole, the Board of Probation and Parole stated "you have not successfully com-

pleted MOSOP as required by law." Appellant's App. 33. As applied to inmates who committed crimes prior to 1990, the revised statute is clearly a retrospective law, thus satisfying the first element of an *ex post facto* analysis.

Clifton, Finley and Kennison argue they were disadvantaged, as required by the second element of *ex post facto* analysis, when they were denied credit release dates because they failed to complete MOSOP, whereas under the law applicable to them, they were merely required to participate in MOSOP.

Under the Missouri parole statute, parole is not a protected constitutional right and inmates have no protected liberty interest in parole. *Gale v. Moore*, 763 F.2d 341, 343 (8th Cir. 1985). Nevertheless, to be disadvantaged, an inmate need not suffer the violation of a vested, enforceable right. *Burnside v. White*, 760 F.2d 217, 220 (8th Cir.), *cert. denied*, 474 U.S. 1022 (1985). Determination of eligibility for parole relates to an inmate's punishment, *Maggard v. Moore*, 613 F. Supp. 150, 152 (W.D. Mo. 1985), and a statute is *ex post facto* if it adds new punishment to that in effect at the time of the crime. *Peeler v. Heckler*, 781 F.2d 649, 651 (8th Cir. 1986). The inmates' claim that revoking their eligibility for parole constituted a punishment and disadvantaged them retrospectively under the 1990 statute raises a possibility of relief that should be addressed by the district court.

We recognize that apparently two of the inmates committed their crimes after the enactment of the 1984 regulation requiring completion of MOSOP for parole eligibility.[4] The state officials contend that under the terms of the regulation, these two already were required to complete MOSOP and were not disadvantaged by the 1990 statute. The inmates argue the 1984 Department of Corrections regulation requiring completion conflicts with the

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[4] We note unresolved discrepancies in the briefs and the district court opinion regarding the years the various inmates committed the crimes and were sentenced. These facts should be clarified upon remand.

1980 statute and was invalid and wrongfully applied. While we presume the validity of an administrative regulation, a regulation that conflicts with a statute is invalid. *Burnside*, 760 F.2d at 221. Whether a conflict exists, however, between the statute and the regulation is a matter to be addressed on remand.

Because we find that under these facts it would have been possible to grant relief to one or more of the inmates, we reverse the grant of the motion to dismiss and remand for further proceedings consistent with this opinion.[5]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[5] We remand on the *ex post facto* issue. The other issues raised on appeal are without merit.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-0254C(6)
Consolidated With:
No. 91-0322C(6)

DEWAYNE CLIFTON,
Plaintiff,

vs.

JOHN ASHCROFT, et al.,
Defendants.

DAVID C. FINLEY,
Plaintiff,

vs.

WILLIAM WEBSTER, et al.,
Defendants.

No. 91-0990C(9)

EVERETT E. KENNISON,
Plaintiff,

vs.

DICK D. MOORE, et al.,
Defendants.

ORDER

[Filed: Sept. 21, 1993]

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendants' motions to dismiss the complaints in these actions for failure to state a claim are granted.

Dated this 21st day of September, 1993

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-0254C(6)
Consolidated With:
No. 91-0322C(6)

DEWAYNE CLIFTON,
Plaintiff,

vs.

JOHN ASHCROFT, et al.,
Defendants.

DAVID C. FINLEY,
Plaintiff,

vs.

WILLIAM WEBSTER, et al.,
Defendants.

No. 91-0990C(9)

EVERETT E. KENNISON,
Plaintiff,

vs.

DICK D. MOORE, et al.,
Defendants.

MEMORANDUM

[Filed: Sept. 21, 1993]

These cases are before the Court on remand from the Eighth Circuit Court of Appeals. In each case, a Missouri inmate convicted of a sexual offense claims that application to him of Mo. Rev. Stat. § 589.040.2, requiring that sexual offenders complete the Missouri Sexual Offenders Program (MOSOP) prior to release on parole, violated the ex post facto clause because he was sentenced prior to the 1990 effective date of an amendment to the statute.

Plaintiffs would be entitled to relief if a statute were applied to them retroactively to their disadvantage. The cases are on remand for a clarification of the dates of plaintiffs' convictions/sentencings, and for a determination of whether a 1984 regulation of the Missouri Department of Corrections is invalid because it conflicts with the original 1980 MOSOP statute. *Clifton v. Ashcroft*, No. 92-2030, slip op. at 7 & n. 4 (8th Cir. June 29, 1993) (unpublished per curiam).

In 1980 the Missouri Legislature enacted Mo. Rev. Stat § 589.042. Subsection 1 of the statute requires the director of the Department of Corrections to develop a program of treatment, education and rehabilitation for all inmates serving sentences for sexual assault offenses. "[T]he ultimate goal shall be the prevention of future sexual assaults by the participants in such programs." Subsection 2 provides that "[a]ll persons imprisoned . . . for sexual assault offenses shall be required to participate in the programs developed pursuant to subsection 1."

In 1984 the Department of Corrections adopted a regulation requiring sexual offenders to complete MOSOP, the treatment program developed by the Department, prior to being eligible for parole. In 1990, the Missouri Legislature amended § 589.040.2 to substitute "successfully complete the programs" for "participate in the programs."

David C. Finley was sentenced on June 30, 1983, for a crime committed in 1982; Everett E. Kennison was sentenced on

February 1988, for a crime committed in 1986; and DeWayne Clifton was sentenced on January 11, 1989, for a crime committed in 1987.[1]

In its cases dealing with the 1980 version of § 589.042, the Eighth Circuit has presumed that the statute required sexual offenders to *complete* MOSOP as a condition for parole eligibility. In *Parton v. Armontrout*, 895 F.2d 1214 (8th Cir.), *cert. denied*, 111 S. Ct. 212 (1990), the Court held that the 1980 statute could not be applied retroactively to require an inmate convicted in 1972 to complete MOSOP. *See also Huston v. Dowd*, No. 91-1642 (8th Cir. Mar. 16, 1992) (unpublished per curiam).

In *Jones v. Moore*, 996 F.2d 943 (8th Cir. 1993), issued one day before the decision remanding the present cases, the Eighth Circuit held that an inmate who had been sentenced in 1982 did not have a liberty interest in being afforded the opportunity to participate in MOSOP, even though he was required to complete the program prior to release on parole. *Id.* at 945.

This interpretation of the 1980 statute is consistent with the purpose as well as the scheme of the statute. It would be meaningless if sexual offenders were only required to attend MOSOP for an unspecified amount of time. A further indication that the original statute required completion of MOSOP for parole eligibility is that even after the 1990 amendment, the descriptive title of the statute remains "Duties of division of corrections — certain inmates to participate in programs."

Thus, it is clear that the 1984 regulation of the Department of Corrections is not inconsistent with the "sense and meaning" of the 1980 statute. *See Burnside v. White*, 760 F.2d 217, 221 (8th Cir.) (administrative regulations are presumed valid; Missouri Parole Board regulation allowing it to consider seriousness of

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[1] As of the date of this opinion all three inmates have been released on parole. Thus, their requests for equitable relief are moot.

crime is not inconsistent with statute providing for parole when prisoner can be released without detriment to himself or society), *cert. denied,* 474 U.S. 1022 (1985).

Furthermore, requiring sexual offenders who, as here, committed their crime after the effective date of the 1980 statute to complete MOSOP for parole eligibility is not a violation of the ex post facto clause as that version of the statute has been interpreted to impose this requirement.

Dated this 21st day of September, 1993.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2501

KENNISON
APPELLANT

vs

MOORE
APPELLEE

APPELLANTS MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY FEES

ARGUMENT

In May of 1975 the Supreme Court of the United States of America decided Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) which held prevailing parties in litigation could not recover attorney fees from the losing party absent a showing of extraordinary circumstances. In response to Alyeska Congress enacted the Civil Rights Attorney's Fee Awards Act of 1976 codified as 42 U.S.C. Section 1988. This act was designed to attract competent counsel to undertake civil rights litigation. This legislative history of the act in S. Rep. No 94-1011, 94th Cong. 2d Sess. reprinted in 1976 U.S. Code Cong & ad. News 5908 indicated that fee's would be paid to attorneys in a manner as "traditional with attorneys represented by fee paying clients" even when the results obtained are entirely non-pecuniary or solely of nominal pecuniary value.

Attorney Ablestein was court appointed. There is no exclusion in the act for payment of fees to court appointed attorneys. Case law indicates that payment may be made to attorneys who represent an attorney in fee appeals under 42 U.S.C. Section

1988. See Davis v. Board of School Commissioners, 526 F.2d 865, 868 (5th Cir. 1976), Ramsey v. Chrysler First, Inc., 861 F.2d 1541 (11th Cir. 1988) Ustrak v. Fairman, 851 F.2d 983, 990 (7th Cir. 1988). Jackson v. Illinois Prison Review Board, 856 F.2d 890, 896 (7th 1988). Logically then an appellate attorney who is court appointed should be paid if the attorney prevails on appeal. It is incongruous to suggest that a court appointed attorney be denied payment when the court itself sets the scene for the entry of the attorney and limits the attorney action.

Attorney Ablestein was appointed under the inherent power of the court. Ablestein acted as an agent for:

a) the people of the state of Missouri to ensure a government whose actions comply with United States Constitutional principles.

Attorney Ablestein was ethically bound to zealously defend and promote the position of his client due to ethical rules and attorney-client relationship. Attorney Ablestein vigorously researched and litigated the issues in the case. However, it is clear that the prisoner could not pay Attorney Ablestein's fees due to incarceration and indigency. It is for this reason Congress enacted 42 U.S.C. Section 1988 ; so that people aggrieved by unconstitutional acts could seek redress and afford payment of attorney fees.

The scope of Ablestein's agency was limited to that of appellate counsel. While acting within the scope of his agency attorney Ablestein :

a) Achieved the ends of litigation in interest of the federal courts,

b) Achieved benefits to the citizens of the state of Missouri,

c) Achieved success in the appeal by obtaining a reversal and a finding in favor of Appellant,

The scope of Ablesteins agency was limited by the appointment. Prior to appointment Ablestein was not involved in the case nor had any interest in the case. During this agency Attorney Ablestein obtained complete success on the merits of the appeal by obtaining a reversal. This reversal altered the legal status between the Appellant and Appellee by reversing the dismissal and revitalizing the complaint of Appellant which had been previously dismissed.

PREVAILING PARTY STATUS

The legal relationship between Appellant and Appellee has changed. By voluntary action the Department of Corrections agents and individuals have:

1) Released all previously incarcerated inmates and granted them a liberty interest which carries an independent status and requires due process of law to revoke or alter,

2) Gave to Appellants the rights to remand and rehearing at District Court with appointed Counsel.

This leads to the "prevailing party" status question. Appellee indicates in his Motion in Opposition to Attorney Fee's that Farrar v. Hobby, 506 U.S. __, 113 S. Ct. 566, 121 L.Ed. 2d 494 (1992) requires a material alteration in legal status of the parties. The two points made in this paragraph above are both material alterations in the legal relationship of Appellant and Appellee; beyond that these are two of the goals of the lawsuits that the Appellants filed. Appellant contends Appellee reads this case too broadly and does not overturn previous Supreme Court precedent regarding prevailing party status, catalytic results of litigation, voluntary compliance by the defendant that alters relationships between the parties or prevailing party status which occurs when the actions of defendant bring about "mootness". Appellant proposes this case is distinguished in relief sought and

results of plaintiff's litigation — Appellant Kennison sought release from unconstitutional continued incarceration and he received this relief (discussion below).

The prevailing party status occurs when "a party has succeeded on any significant issue in litigation which achieves some of the benefits the parties sought in bringing the action." See Nadeau v. Helgemo, 781 F.2d 275, 278-279 (lst Cir. 1978 and quoted in Hensley v. Eckerhart, 461 U.S. 424 (1983). The parties sought relief from imprisonment and this has occurred. On appeal the parties sought reversal and remand and this has occurred. See Texas State Teachers v. Garland Independent School District, 489 U.S. 792, 109 S. Ct. 1486,1489, 103 L.Ed. 2d 866. The remedy must be legally relevant and in this case it is.

A money judgement is not required to prevail under 42 U.S.C. Section 1983. Injunctions, declaratory relief or voluntary compliance by the defendant supports an award of fees, so long as the remedy obtained "affects behavior of the defendant toward the plaintiff." See Rhodes v. Stewart, 488 US 1, 4 (1988). In this case the agents of the state have given additional liberty status to all incarcerated inmates and have also through Appellee's attorney achieved Federal District Court results in which Judge Gunn has indicated this controversy is "mooted". While Appellant does not agree with this finding and this will be discussed below ; the state has voluntarily in concerted action as a result of this litigation in a manner designed to cut their losses. Appellant may still prevail in a case which is settled or mooted before reaching judgements on the merits if the plaintiff lawsuits or Appellants reversal of district courts findings causes retrenching in so that the lawsuit or reversal is "a substantial factor or significant catalyst in motivating the defendants to end their unconstitutional behavior. See Louisiana High School Athletic Association, 915 F.2d 163 (5th Cir. 1990).

In Appellant Kennison's case he was denied his release date by the Parole Board in November of 1992 and given at that time a release date of October 3, 1993. Kennison was released August 10, 1993. This is clearly action of the Appellee's due to litigation and was involuntary in that:

i) Appellant Kennison was released two months earlier then his release date,

ii) and at a time corresponding with the litigation we are concerned with.

iii) Appellant proposes that the court consider the early release as evincing an intent on the part of Appellees to:

  i) Cut their losses and

  ii) Moot the controversy.

This was one element of the relief requested in Kennisons original complaint. The release on October 3, 1993 was 54 days earlier then his previously established release date. Appellant Kennison did complete MOSOP. In Maher v. Gagne, 448,129 U.S. 122, 100 S.Ct. 2570, 2574, 65 L.Ed. 2d 653 (1980) the Court indicates "For example, a party may be considered to be 'prevailing; if the litigation successfully terminates in a consent decree, an out of court settlement, a voluntary cessation of the unlawful practice by the defendant, or other mooting of the case where the plaintiff has vindicated his right.

The United States Senate Report regarding prior 42 U.S.C. Section 1983 awards expressly states that "for purposes of the award of counsel fees , parties may be considered to have prevailed when they vindicate rights through a consent judgement or without formally obtaining relief." S.Rep. No. 94-1011, p. 5 (1976); [1976 U.S. Code Cong. & Ad. News 5908, 5912.]. Since Appellant Kennison had requested release from custody

and is now released he obtained as a result of litigation one of the goals of his litigation;

a) Appellant is no longer incarcerated

b) the state has granted him a liberty interest in parole, and

c) the unconstitutional confinement has ended.

INHERENT POWER OF THE COURT AND BAD FAITH LITIGATION

The Court may shift fees in the case of bad faith litigation. Under inherent power of the Court the federal court can fashion relief where misuse of process occurs or litigation is abused in bad faith. While not making an accusation I will draw the following actions of Appellee to the Courts attention and pray the Court consider the issue of bad faith and fee shifting :

i) According to Mr. Kennison he received correspondence from Appellee's or the Federal Eastern District Court for Missouri that:

a) On September 27, 1993 Appellee's Filed a Motion to Dismiss his Civil Action, and

b) that on that date the Federal District Court by Judge Gunn ruled on the motion and dismissed Appellants case on remand from the Eighth Circuit.

Appellant was not notified that his case had been transferred to a Federal District Court. Appellant was not notified of the motion to dismiss of or of the resultant hearing below. Appellant was not counseled. He was not proceeding pro se because he had no notice of the proceeding. Either Appellee's or Judge Gunn if done on his own motion has deprive Appellant of Due

Process of Law as found in the Fifth and Fourteenth Amendment United States Constitution and the right to compulsory process of witnesses and right to confrontation under the Sixth Amendment United States Constitution and the Right to Counsel as secured in the sixth amendment (either pro se, appointed or retained- this being particularly in question due to the nature of the action before the court arising from alleged criminal acts, a criminal conviction and status of Appellant in relationship to the State of Missouri by virtue of criminal conviction and liberty interest retained upon release from confinement.

ii) During the course of Appeal, Appellees :

a) Had ex-parte contact with the court to dismiss or affect appeal after oral argument without notification to Attorney Ablestein,

b) Either through misunderstanding or deliberation:

1) Misstated in reply briefs statements attributed to Attorney Ablestein and reworded arguments or put forth arguments which Appellant's Attorney did not make while attributing the arguments to Attorney Ablestein; which served to mislead the Court and turn argument away from issues Appellant presented.

c) In response to requests by the Court for dates of incarceration were vague and ambiguous while having complete access to Attorney General for State of Missouri and Department of Corrections records.

If the Court finds any of these actions to be bad faith litigation in it's inherent power Appellant requests Attorney fees be awarded to Appellant. That the Court has this power may be found at F. D. Rich Co., 417 U.S. 116, 129, 94 Su. Ct. 1157, 2165 or Vaughn v. Atkinson, 369 U.S. 527, 82 S. Ct. 997, 8 L.Ed. 88. (162)

CONSTITUTIONAL INTERPLAY WITH INHERENT POWER OF THE COURT AND COURT APPOINTED ATTORNEY FEES

Attorney Ablestein was appointed under the inherent power of the Court. Attributed to Abraham Lincoln while practicing as an attorney is the statement a lawyers time is his stock and trade. The efforts Attorney Ablestein put forth in this appeal were a taking under the Fifth Amendment of Attorney Ablestein's property — his stock and trade; that being time and as a result the State should compensate Attorney Ablestein for this taking.

If under the inherent power of the Court, the Court may shift fees to accomplish the ends of justice, then it can award Appellant Attorney fees to pay court appointed Attorney Ablestein. If the taking of Attorney Ablestein's stock and trade was known to the court then Attorney Ablestein proposes this was a taking without due process of law and a violation of Attorney Ablesteins civil rights as guaranteed under the Fifth and Fourteenth Amendment United States Constitution.

Attorney Ablestein was not admitted to the Eighth Circuit when the Court appointed this case under it's inherent power. In fact after appointment to the case, Attorney Ablestein's application for admission to practice before the Eighth Circuit was returned, denied for failure to have a sponsor's signature. If attorney Ablestein has rendered service to the state and federal government under penalty of sanctions and is denied compensation for his stock and trade then Appellant suggests that this is a violation of the equal protection clause of the Fourteenth Amend-

ment United States Constitution in that the Court has established a sub-class of citizen who are denied the same and equal protection from denial of property rights then other citizens, this sub-class being the class of state Attorneys versus non-attorney citizens.

PRAYER FOR ADDITIONAL RELIEF

In it's inherent power and as a matter of law under 42 U.S.C. Section 1988 this Court may find for Appellant. Should this Court find for Appellant, Appellant prays the court award an upward adjustment of the fee for delay in compensation as per Missouri v. Jenkins, 491 U.S. 274, 284 (1989) and Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 483 U.S. 711 (1987) and an adjustment or direct payment for additional time in litigation of the fee issue as per Jones v. MacMillan Bloedel Container, Inc. 685 F.2d 236, 239 (8th cir ____). Regarding other aspects of the Attorney fee's deemed awardable, Appellant defers to the Courts interpretation of "reasonableness" both in time, lodestar rate and adjustments relying on the Courts sense of justice at this time and without cause to argue same.

/s/ David Ablestein,
Attorney-Appellant
9378 Olive Street Road
Suite 120
St. Louis, Missouri 63132
(314) 994-7112

A copy of the above was sent first class postage pre-paid to Mr. R. Henry Branom, acting for Sandberg, Phoenix and von Gontard P.C., One City Centre, 15th Floor, St. Louis, Missouri 63101 on the 9th October, 1993.

/s/ David Ablestein
David Ablestein,
Attorney-Appellant

APPENDIX E

SANDBERG, PHOENIX & VON GONTARD
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS
ONE CITY CENTRE • 15TH FLOOR
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October 26, 1993

Mr. Michael Gans
Clerk of the U. S. Eighth
Circuit Court of Appeals
1114 Market Street
St. Louis, MO 63101

Re: Everett E. Kennison v. John Ashcroft, et al.
No. 92-2501

Dear Mr. Gans:

Let this serve as Appellees' Response to your request of October 20, 1993, concerning Appellant Kennison's release from prison.

The facts as stated on page four of Appellant's Reply Memorandum in Support of Motion for Attorney's Fees and quoted in your letter of October 20, 1993, are not true.

On December 30, 1991, the Parole Board extended inmate Kennison's release date to October 2, 1993. This Summer, in response to the flooding which hit the State of Missouri, Governor Mel Carnahan issued Executive Order 93-18. This Order was in response to the flooding of the Renz Correctional Center. The

flooding of the Correctional Center caused the relocation of the inmates from that facility to other correctional centers in the State. Pursuant to Executive Order 93-18, inmates who were close to their release date were released from prison in order to ease the crowded conditions. A condition of release for those inmates was that they participate in flood relief efforts as directed by their individual parole officers. Inmate Kennison was released to the Electronic Monitoring Program on August 10, 1993, pursuant to this Order. He was eligible for release, pursuant to Executive Order 93-18, because he had successfully completed MOSOP. Parole was granted to Mr. Kennison on the scheduled date of 10-2-93.

The decision to release inmate Kennison was not influenced in any manner whatsoever by this litigation. The persons involved in the decision to release inmate Kennison were unaware of the pendency of this case. Inmate Kennison's parole file is completely void of any reference to this lawsuit. Inmate Kennison was treated no differently than the hundreds of other inmates who were released under this special occurrence necessitated by the flood disaster in the State of Missouri.

I hope this answers the Court's questions concerning this matter, however, if it does not, please feel free to contact me.

Very truly yours,

/s/ R. Henry Branom Jr.
R. Henry Branom Jr.

RHB: jar
cc: Mr. David Abelstein

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2501

EVERETT E. KENNISON,
Appellant,

vs.

JOHN ASHCROFT, et al.,
Appellees.

APPELLEES' REPLY TO APPELLANT'S MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY'S FEES

COME NOW Appellees, by and through their Attorneys, Sandberg, Phoenix & von Gontard, P.C., and hereby submit their Reply to Appellant's Memorandum in Support of Motion for Attorney's Fees.

I. FACTS

Appellant Kennison, while incarcerated at the Missouri Eastern Correctional Center, filed a *pro se* 42 U.S.C. § 1983 action against Appellees. In his Complaint, Appellant alleged that the requirement that he complete the Missouri Sexual Offender Program ("MOSOP") prior to being eligible for parole violated the *ex post facto* provisions of the Constitution. *See* § 589.040 RSMo. Appellees filed a Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The District Court granted this Motion, and the instant appeal was taken.

This Court appointed Attorney David Abelstein to represent Kennison on appeal. The case was briefed and argued before the Court on March 15, 1993. After the argument, Rick White, a Clerk for the Court, contacted the undersigned Attorney for

Appellees, and asked for information regarding the conviction date of the Appellant. In response, Counsel sent a letter to Mr. White containing the relevant dates and also sent a copy to Counsel for Appellant. On June 29, 1993, the Court issued its opinion, which remanded the case on the ex *post facto* issue. The Court held that, "The other issues raised on appeal are without merit." *See* Opinion, p.7, n.5. Appellee subsequently filed a Petition for Rehearing, or in the Alternative, Rehearing En Banc. This summer, Missouri Governor Mel Carnahan issued Executive Order 93-18. That Order provided that certain inmates could be released from incarceration in order to relieve overcrowding in the Department of Corrections caused by the flooding of the Renz Correctional Center. A condition of the inmate's release was that they were to participate in flood relief activities as directed by their parole officer. Appellant was released pursuant to this Executive Order. He was considered for release under this program because he had successfully completed MOSOP during the pendency of this litigation.

On August 17, 1993, the Court denied Appellees' Petition for Rehearing. On August 24, 1993, the mandate of the Court was issued, remanding the case to the United States District Court for the Eastern District of Missouri. Listed on the cover letter from the Clerk of the Court are Appellee Kennison, as well as Attorney Abelstein.

Appellant has filed a Motion seeking attorney's fees, pursuant to 42 U.S.C. § 1988, as a "prevailing party", in the amount of $19,035. Appellees filed a Memorandum in Opposition to this Motion. At the Court's request, Appellant then filed a Memorandum in Support of Motion for Attorney's Fees.

II. ARGUMENT

A. PREVAILING PARTY

Appellant is not entitled to attorney's fees because he is not a prevailing party. To be considered a prevailing party within the

meaning of § 1988, Appellant must be able to point to a resolution of the dispute which changes the legal relationship between himself and the Appellees. *Texas Teachers v. Garland School Dist.*, 49 U.S. 782, 792 (1989). Appellant argues here that because he was released from incarceration, he has effected a change in the status between himself and Appellees. Appellant, however, also states in his Memorandum that he successfully completed MOSOP. The completion of MOSOP, and the flood relief program, however, are what led to Appellant's release from incarceration.

This Court did not order Appellees to release Appellant from incarceration. In fact, even if Appellant sought that as relief, this Court held that issue was without merit. (*See* Opinion, p.7, n.5.). The only result of Appellant's appellate efforts was to achieve the right to continue proceeding in the District Court. An interlocutory ruling, however, that a Complaint should not have been dismissed for failure to state a claim, is not a legal victory sufficient to award attorney's fees. *Hewitt v. Helms*, 482 U.S. 755, 782 (1987).

Moreover, the District Court has, after this Court remanded the case to the District Court, held that Plaintiff/Appellant's Complaint still did not state a claim. Thus, it is even more clear that Appellant is not the prevailing party in this case.

B. BAD FAITH LITIGATION

Appellant suggests, without support and improperly so, that Appellees in this case have somehow been involved in bad faith litigation. Appellant claims to have somehow been kept in the dark concerning the proceedings in this case. A review of this Court's file indicates that both Appellant and his Counsel were listed as having been mailed copies of all rulings subsequent to the issuance of the opinion in this case. Furthermore, the Court's opinion specifically remanded the case for further proceedings

in the District Court. It is inconceivable that Appellant's Counsel could somehow be surprised that the case was, in fact, remanded.

Appellees filed no motion in the District Court after the remand. The District Court, Honorable George F. Gunn, Jr., *sua sponte* granted dismissal. No hearing was conducted. Despite Appellant's assertions, Appellees, nor their Counsel, have had no *ex parte* contact with the District Court. To make such claims without support is, itself, improper.

Counsel for Appellees did reply to an inquiry of a Clerk of this Court concerning the date Appellant committed his crime and the date he was sentenced to prison. Moreover, a copy of this correspondence was sent to Counsel for Appellant. Clearly, it is not an *ex parte* contact.

Appellant further alleges in paragraph (b) on page 6 of his Memorandum that Appellees misstated, in a Reply Brief, statements attributed to Attorney Abelstein. Curiously, and as this Court can see for itself, Appellees did not file a Reply Brief. Quite frankly, the undersigned Counsel for Appellees is unable to ascertain what Appellant is alleging in paragraph (b).

Rule 11 of the Federal Rules of Civil Procedure provides that the signature of an attorney on a pleading signifies that after having read the pleading, and to the best of the signer's knowledge, information and belief, that the allegations made therein are well founded in fact and are formed after reasonable inquiry. Fed.R.Civ.P. 11. Clearly, Counsel for Appellant has not complied with this requirement. A simple review of the District Court and Court of Appeals' file would reveal that the allegations of bad faith litigation made in Appellant's Memorandum are not true.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellees pray this Honorable Court deny Appellant's Motion for Attorney's Fees.

Respectfully submitted,

SANDBERG, PHOENIX
& von GONTARD, P.C.

By /s/ R. Henry Branom Jr.
R. Henry Branom Jr.
One City Centre 15th Floor
St. Louis, Missouri 63101
(314) 231-3332

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, first-class postage prepaid, this 28th day of October 1993, to:

Mr. David Abelstein
Attorney at Law
9378 Olive Street Road
Suite 120
St. Louis, Missouri 63132

/s/ Joyce Ratcliffe

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2501EMSL

Everett E. Kennison,
Plaintiff - Appellant,

vs.

Dick D. Moore, et al.,
Defendants - Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

On review of the motion for attorney's fees by appellant's attorney, we grant an allowance of $2,500 on the ground that appellant in this case has prevailed, if at all, only to a slight degree.

Judge Wollman dissents from the order and would not allow any attorney's fees.

December 14, 1993

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2030/2501EMSL

Everett E. Kennison,
Appellant,

vs.

Dick D. Moore, et al.,
Appellees.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 9, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit